

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 02-38

September 11, 2002

RE: Does employee's service as an administrator present a potential conflict of interest?

DECISION: Yes.

This opinion is in response to your June 14, 2002, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 11, 2002, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Cabinet for Health Services' Department for Mental Health and Mental Retardation Services (the "Department") has placed a classified employee on administrative leave pending a pre-termination hearing. The employee, prior to being placed on leave, was the site director of a residential facility for adults with mental retardation, which is owned and operated by the Department, and licensed by the Office of Inspector General ("OIG") within the Cabinet for Health Services. On May 31, 2002, the employee requested approval of outside employment as a "management consultant" with a long-term-care facility and also with a construction company. Both facilities are owned by the administrator of the long-term-care facility. In his request for approval, the employee represented that neither the long-term-care facility nor the construction company has a contractual relationship with the Commonwealth. You state that the long-term-care facility is a participant in the Medicaid and Medicare programs and has a written provider agreement with the Cabinet's Department for Medicaid Services. Additionally, the long-term care facility is licensed, inspected and regulated by the Cabinet's OIG, Division of Long Term Care.

A representative of the Department contacted the long-term-care facility to verify the employee's status at the facility and was informed that the employee was the new "administrator" of the facility. When the representative contacted the long-term-care facility the following day, the representative was informed that the employee was not the "administrator," but was in the facility as a consultant and had authority to make decisions. The employee also explained that he was not the "administrator" and he did not have authority to make decisions. He explained that he had been volunteering at the facility, but was not yet a paid employee.

ADVISORY OPINION 02-38

September 11, 2002

Page Two

Upon further research, the Department has discovered evidence that the employee entered into a contract with the long-term care facility on May 1, 2002, to serve as a licensed administrator for the facility and to be on site at the facility at least 40 hours per week. Additionally, the employee invoiced the long-term-care facility on May 1, 2002, for \$3700 for 60 hours of work spent on-site at the facility. It appears that the employee began his outside employment prior to receiving approval from the Cabinet, and that his work involves duties of an administrator.

The Cabinet's Office of Inspector General has recently found numerous violations of statutes and regulations governing the operation of long-term-care facilities by the long-term-care facility at which the employee wishes to work. If these deficiencies are not corrected, the OIG will initiate proceedings to revoke the facility's license. You believe if the employee is, in substance, the administrator of the facility, and if his duties include assuring compliance with state and federal requirements, then he would be in direct conflict with the representative of the OIG charged with licensing and regulating the facility. The Cabinet could be placed in a position of having one of its own employees called as a consultant/witness by the facility that it is trying to shut down.

You ask the following:

1. *Assuming that the employee is employed as a management consultant who does nothing more than provide advice and administrative assistance to the facility, may the employee accept this position without violating the Executive Branch Code of Ethics as set forth in KRS Chapter 11A and as interpreted by the Commission in its rulings?*
2. *Assuming the employee's duties make him the de facto administrator of the facility with responsibility for assuring compliance with State and Federal requirements, may the employee accept this position without violating the Executive Branch Code of Ethics as set forth in KRS Chapter 11A and as interpreted by the Commission in its rulings?*
3. *Did the acceptance by the employee of this employment without prior approval of the Cabinet violate the Executive Branch Code of Ethics as set forth in KRS Chapter 11A and as interpreted by the Commission in its rulings?*

After you submitted your request to the Commission, the employee submitted his resignation, to be effective September 15. Thus, you also ask whether his acceptance of compensation from the long-term care facility will violate any post-employment provisions of the Executive Branch Code of Ethics.

Regarding outside employment, KRS 11A.040(10) provides:

(10) Without the approval of his appointing authority, a public servant shall not accept outside employment from any person or business that does business with or is regulated by the state agency for which the public servant works or which he supervises, unless the outside employer's relationship with the state agency is limited to the receipt of entitlement funds.

(a) The appointing authority shall review administrative regulations established under KRS Chapter 11A when deciding whether to approve outside employment for a public servant.

(b) The appointing authority shall not approve outside employment for a public servant if the public servant is involved in decision-making or recommendations concerning the person or business from which the public servant seeks outside employment or compensation.

(c) The appointing authority, if applicable, shall file quarterly with the Executive Branch Ethics Commission a list of all employees who have been approved for outside employment along with the name of the outside employer of each.

Additionally, KRS 11A.020(1)(a) and (b), and (2) provide:

(1) No public servant, by himself or through others, shall knowingly:

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

(b) Use or attempt to use any means to influence a public agency in derogation of the state at large;

...

(2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.

ADVISORY OPINION 02-38

September 11, 2002

Page Four

From the information provided, it does not appear that the employee is seeking “employment” with the long-term-care facility, but rather is acting as an independent contractor. Thus, the employee would not be required by KRS 11A.040(10) to obtain advance approval for such activity. However, the Cabinet or Department may have a policy that requires such activity to be approved in advance. If so, the employee should follow the Departmental policy.

Additionally, the employee would be required to ascertain that no conflict of interest exists between his private consulting business and his official position with the Department that would violate KRS 11A.020(1) and (2). Thus, the Commission believes that the employee should not serve, in substance, as the administrator and representative before the Cabinet for the long-term-care facility while still in the employ of the Department. Because the long-term-care facility is currently in negative action with the OIG, such outside activity by the employee would appear to be a potential violation of KRS 11A.020(1)(b), which prohibits an employee from attempting to influence a public agency in derogation of the state at large. Additionally, KRS 11A.020(2) would prohibit the employee from appearing before the Cabinet regarding the long-term-care facility, as it may appear to the public that he is using his official position to help the private facility.

The Commission also cautions the employee not to use any state time or equipment for his private benefit.

Regarding post-employment issues relevant to the employee, KRS 11A.040(8) and (9) provide:

(8) A former public servant shall not act as a lobbyist or lobbyist's principal in matters in which he was directly involved during the last thirty-six (36) months of his tenure for a period of one (1) year after the latter of:

(a) The date of leaving office or termination of employment; or

(b) The date the term of office expires to which the public servant was elected.

(9) A former public servant shall not represent a person or business before a state agency in a matter in which the former public servant was directly involved during the last thirty-six (36) months of his tenure, for a period of one (1) year after the latter of:

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 02-38

September 11, 2002

Page Five

- (a) The date of leaving office or termination of employment; or
- (b) The date the term of office expires to which the public servant was elected.

Because the employee had no involvement with the long-term-care facility as part of his official duties for the state, the Commission does not believe the employee is prohibited from employment with the long-term-care facility upon the effective date of his resignation. However, for one year, the employee should not represent the long-term-care facility before the state in matters in which he had direct involvement during the last three years of his state employment, and he should not act as or employ a lobbyist in matters in which he had direct involvement during the last three years of his state employment.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Cynthia C. Stone, Esq.